Female Genital Mutilation

Law, Religion, Anathema and Global Health

by Massimo Papa*

Abstract
This paper addresses the issue of the human rights, their acknowledgment in different contexts and the specific issue of the female genital mutilation, decodified under the lens of tradition and that of universal human rights. The method is that of juridical comparation under a diachronic and synchronic lens, with an analysis of the evolution of the concept inside and outside the Islamic world. The acceptance of the female genital mutilation as a proper Islamic tradition is questioned and denied, together with the effective compliance of many Governments in their commitment to operate towards an effective legal uniformity at a global level.

Keywords
Human rights, female genital mutilation, law, sharia, international cooperation.

1. Introduction

A right qualified as human, or – *rectius* – the category of human rights is a challenge to both jurisprudence and philosophy that crosses human life in a transversal way[1]. Even in a deep past, in the classical era, many have considered how a human being as such is worthy of protection: not only of protection of his goods, of his property, from external usurpations, but worthy of protecting his integrity (both physical and moral), his life, his self-determination[2], as much by other peers as by the action of the State, which is far from always legitimate. Free determination of thought and availability of one's own body are the highest categories in which the concept of human rights can be enclosed. Female genital mutilation is a complex subject, and complexity requires different approaches. Firstly, a clear idea of law in its deepest sense, that of religion, those of concepts such as universality and cogency of the norm and, above all, that of person. These concepts are all very present in everyday talks, in jurisprudential

* Full professor in Comparative Private Law and expert in Sharia' and law of Islamic Countries, Tor Vergata University, Rome, Italy.

production, in contemporary mentality, and in statements and commitments made at international level by various and important actors on the world scene. Yet, the world is far from this unification of norms, and from their uniform application. Lawyers have a clear duty to point out this shortcoming. Several States have recognized their duty to intervene and have made commitments by signing specific declarations. The world needs no further proclamations but an actual and uniform protection of human rights.

2. Human right, divine right?

It is particularly important to underline that the subject of human rights does not concern solely the law of a religion or that of individuals, or that of singular state-level legal systems[3]. Human rights are an issue that has appeared very late in the juridical thought[4]: it has shown to the attention of jurists already in the modernity. Nevertheless, it has been present – in its nature and functions – since the depths of history, given that in its philosophical conception human rights have appeared and have attracted the attention of thinkers much before the modernity. The concept has been unexpressed n the depths of legal thought as well, because (that may perhaps be the only possible case) it leads to the question *par excellence*, the question of questions. Is there law already once the individual exists, or does the law exist only if it is systematized, that is once it is acknowledged by a legal system, thus defining a relationship between several individuals and a system of law? Is law a product of history, as a certain materialistic conception has intended to teach, or does it transcend it? Does it need legitimacy?

3. In the West

It is commonly accepted that *ubi societas, ibi jus.* It has always been an almost introductory motto to the legal reality, an unquestionable mark, a typical conception that originates into the antiquity of legal doctrine or, *rectius*, into the bases of its analytical conception. Santillana said that hermeneutics, therefore interpretation, is not the fruit of knowledge but the search for "the last and most colorful tree in the garden of knowledge". What do we grasp then if we go to interpret the motto in its deepest root?

In the West, law was born as functional to the relationship between individuals and things, what in a modern civil perspective we could define as goods. Western legal experience has begun to protect relations, especially the economic ones. The first rights were conceived if *in rem*, therefore related to a *res*, precisely to a thing with an economic value.

The object of the right was therefore, as mentioned, the protection of property (including of course the collective one) which became, where possible, the object of greater protection, that of the Gods. We all remember that Jupiter was the guardian of the covenants, and it is no coincidence that we speak of the *sanctity* of contracts. In short, the presence of the divine intervened to protect the given word, and the riches that were transferred, but also suggested the correspondence of the juridical order to something not only human, but superior: the divine order. We will return to this point, an apparently distant one, which instead concerns human rights very closely.

Law has evolved and has evolved in accordance with the development of societies, the sensibilities of the persons

who constituted them, the philosophical conception of existence and having that the different peoples have accepted and produced in the historical becoming. The concept of human rights, on the other hand, seems to be a late one[5]. Philosophically, especially in the classical Greek environment, there was indeed a respect for the person as such. Aristotle spoke of it in the Nicomachean Ethics, but in a context – that of classical Greece – in which in reality a systematic concept of law did not exist. In fact, Aristotle speaks of *the politic correctness*, and not technically of law.

In Christian religious thought, which shares much with Islamic thought, the idea of law coming from nature as an order constituted by God is strong in Thomas Aquinas, in that period mistakenly defined "Middle Ages" in which so much was elaborated. Thomas' position is lucid and clear, and he captures a lot from Christianity but also from those juridical concepts (*first and foremost* that of law itself). In him, rights are principles, they are ethical in nature and are, above all, *generalissimi*[6]. Interestingly enough, this is a reference to a law that discards formalism and specificity, to a law that refers not to a norm made by man but only perceived by the latter as existing in the order structured by God. It is a general concept which transcends and does not need neither the political authority that formalizes it nor the pen of the jurist who elaborates it. Rights have always existed and are not generated but recognized. It is an important leap, perhaps *the* leap that brings to the acknowledgment of human rights.

As mentioned above, it is only the modernity that brings into existence the rights considered "human", that is those rights existing because a human being is *per se* its titular. That would be the end of the conception of law as the regulation of a relationship between things or persons: not only *ubi societas*, but even *ubi homo, ibi jus*: the law is there once a single man is.

And the key to acknowledge human rights lies on Thomas' right of nature, in natural law: it is in this conception the doors are opened to the recognition of human law in the technical sense and in legal orders using modern tools. Law crosses the boundaries of the single legal systems and something common, or – better said – *universal* is recognized: international law is born, the *jus gentium* in the modern sense, and this leads to wonder what sources it acknowledges, a source that can only be common to all. Some of these rights, then, are known as inalienable as well as natural, and find their formulation during the Enlightenment.

That process would then finally lead to recognize human rights in the technical sense, as an actual norm (*jus cogens*).

Human law exists and it exists because a human being is there. Mankind recognizes it, first they see it, then they formalize it.

4. In the East

Islam is a legal system. The whole of creation is subject to God, it is ideed Islam, that is the submission to His laws. The religious norm, the *sharia*, is that behavior due by mankind so that they can be *Muslim*, that is a coherent and integral part of the divine order. This helps us to understand at least two things, both of fundamental importance: the first is that in Islam the only legislator is God, the second is that man has the mere function to interpretate the law.

Islam has expanded into different territories, bringing with it the need to make the multitude a *unicum*. This uniqueness is recognized in the Islamic attitude to recognize a single order of things, a single law, and to conform the action of all to the divine will.

The reference text is, of course, the Koran, which some schools of thought even consider inseparable from God himself. A reference text that is supposed to be not contradictory, not surmountable. An apical and non-surpassable source of law, to which – therefore – every other subordinate source or norm must comply. It would be absurd to try to synthesize in a single article the very rich history of Islamic legal thought, the struggle over sources and their validity, and the legitimacy to lead the Islamic people and to standardize them under a single law. It is necessary, however, to draw attention to how Islamic law elaborated its terminology to designate a specific source of its law, read in two distinct meanings: it is the concept of "tradition", which in Islamic legal language in Arabic is rendered with *Sunnah*.

5. Female genital mutilation: not an Islamic legal institution

At the beginning of Islamic history (around the year '200 of the *Hijra*, or two centuries after the beginning of Muhammad's preaching) the Islamic Community begin to write anecdotes that go back to the life of the Prophet himself[7]. Those would be a further source of inspiration for the Muslims, helping them – following the infallible example of the Prophet and his first companions – to lead a better life and to fill those gaps that, due to their human imperfection, do not allow them to understand the integrity of the Koran and abstract the right path to follow in every occasion of life. A series of scholars will certify if and at what level each *hadith* (this is the name of the story) is authentic and can be referred to. This mechanism is fundamental in the conception of the law of the Islamic way, its reception of human rights and the issue of female genital mutilation.

In fact, when Islam expands it clashes with a series of traditions, i.e. the culture and the identities of the converts. Islam encounters a world already very rich in tradition. Here comes the different interpretation of the law made by the different doctors of the law, called to elaborate a judgment of legitimacy on the customs found all around the newly found territories: the results coming from their interpretation is surprisingly different.

When Islam meets Africa, in some of its lands genital mutilation is already there. There is no evidence or clue that leads us to believe that female genital mutilation was generated by Islam, but rather that the Muslims found that habit and the new converts just kept on using it. That, over time, was just consolidated and perceived as an Islamic habit. In the end, the old law, which is also *sunnah* (as tradition) and the new law became confused and gave the observants the idea that they were simply following Islamic law, without discerning one source from the other, and pre-Islamic habits from the Islamic ones.

The legal basis that should guarantee the conformity of female genital mutilation to the Islamic norm is a *hadith*, one of those that were not considered authentic, which invites those who intervene on the woman to do so "gently" because this would make the woman's face more radiant. A further lin-

guistic note is important in this regard: circumcision is called *tahara,* which refers to a concept of purification. That would therefore involve the removal of part of the genital apparatus as considered "dirty" in the sense of preventing the state of purity in which the *Muslim* must find himself at the moment in which they perform certain acts or lives some moments of particular religious significance. The phenomenon is therefore affected by all that psychological and social conditions that leads a community to become rigid in its defensive practices in the presence of a perceived risk: here, in the era of Covid, after 30 years of continuous decrease a resumption of this practice was witnessed, together with a lowering of the age limits to which girls are subjected (in Mali it even comes to affect two-year-old girls or less). This involves serious difficulties in finding the victims, and even more in developing response tools – or prevention – able to break down a phenomenon that is now considered to have nothing to do with religion but with practices and superstitions rooted in time.

In particular, the phenomenon is probably linked to the rite of passage, typical of the difficult moment of transition between youth and adulthood.

6. Commitments on mutilation: the necessary global response

A turning point of great importance, which concerns both the recognition of human rights and the specific dignity of women and their physical integrity, is the Protocol to the African Charter of human and peoples' rights on the rights of women in Africa (so-called "Maputo Protocol")[8] of the African Union, dated 2003. The document has a profound function and importance, despite the absence among the signatories of major actors of the African continent such as Egypt and Morocco[9].

The Protocol bases its effectiveness and legitimacy on several sources, which are referred to in the preliminary considerations:

- *First of all*, Article 66 of the African Charter on Human and Peoples' Rights, which provides for the adoption of protocols or special agreements in case of need, to implement the provisions of the Charter.
- *Secondly*, the Conference of Heads of State and Government of the Organization of African Unity in Addis Ababa in 1995, which ratified the recommendation of the African Commission on Human and Peoples' Rights to draw up a Protocol on Women's Rights in Africa.
- *In tertiis*, Article 2 of the African Charter on Human and Peoples' Rights, which prohibits all forms of discrimination, therefore also based on gender, or any other discriminatory situation.

This protocol, which has 32 articles, has the fundamental importance of constituting an effective and real obligation towards the ratifying countries: the commitment is to make the various legislations, through the appropriate reforms of domestic law, recognize fundamental rights such as dignity, life, effective consent to the celebration of marriage and especially the elimination of all practices that consist of acts detrimental to physical and mental integrity of women, explicitly mentioning female genital mutilation in Article 5.

This article, entitled "elimination of harmful practices", provides that Member States "prohibit and condemn all forms of harmful practices

that adversely harm women's human rights and are contrary to international standards", and "take all measures, legislative and otherwise, to eradicate these practices", to raise awareness among all sectors of society, to prohibit them by legislative measures combined with sanctions, to protect women who are at risk of being subjected to harmful practices or any other type of violence, abuse and intolerance. The rule therefore provides for both preventive and repressive actions.

In Italy there are about 90,000 women subjected to this practice. A significative number that should make us reflect on the effectiveness of the tools made available, even outside the majority Islamic territories. In 2006, Law no. 7 (so-called "Consolo Law") introduces new cases to strengthen protection against the phenomenon of mutilation. Articles 583*bis*, 583b are added, which provide for a penalty of 4 to 12 years' imprisonment, increased by one third if committed against minors. The material element of the crime is the cause of mutilation in the absence of therapeutic needs: evident, therefore, even if not expressed, the reference to the Maputo Protocol. It is therefore a further form of internationalization and homogenization of law, in this case taken by a European country in imitation of an African legal instrument.

7. Conclusions

The female genital mutilation shall not be recognized as an Islamic legal institution nor as a mandatory practice inside an Islamic community, rather a relic of precedent cultures and praxis spread over a territory that would later become Islamic and keep its ancient traditions. To date, adequate law enforcement policies do not exist because the commitments taken by many States and organizations have found no effect beside solemn declarations. The existing legal instruments are for the most part obligatory, but they proved neither sufficient nor effective: it shall be stressed that what is missing is not the legal instrument – which is manifested in the Maputo protocol and in other various international sources that, being recalled in the protocol itself, can only be recognized by all signatories –. However, they lack ability and will to fulfill obligations. It is worth mentioning the Sudanese legal system, which since 2020 punishes mutilation with a penalty of mere 3 years of imprisonment.

A minimal form of protection against a practice that, far from the norms of faith, constitutes an evident humiliation of the psychological and physical integrity of the girls as well as a disabling practice.

Notes and References

1. Law and social historians have tried to rebuild a human right tradition that would date back up to the early civilizations: among the first samples of this legislative production we would find legislative *corpora* such as the Hammurabi Code (XVIII Century BC) or the Cyrus Cilinder (VI Century BC). This kind of legislative production, despite their absolute historical and social interest, are not to be considered as a proper legislative issue of human rights in the stricter sense. In this sense, see: Hunt L. (2008), *Inventing Human Rights: a history*, W.W. Norton & Company, New York – London.

2. This concept is here expressed according to a very modern terminology. This reference shall therefore be considered as an *ante litteram* one. For an actual explication of this term in its legal-political meaning, see: Fisch J., Mage A. (2015), *The Right of Self-Determination of Peoples The Domestication of an Illusion*, Cambridge University Press, published online December 2015; doi: https://doi.org/10.1017/CBO9781139805698.003.

3. Human rights are in fact acknowledged at an international, ultra-state, universal level.

4. The first sample of a declaration in this sense is the Universal Declaration of Human Rights of 1948, whose text is available online: https://www.ohchr.org/en/universal-declaration-of-human-rights, accessed 15 June 2023.

5. For an in-depth analysis of thid phenomenon see: Hunt L. (2008), *Inventing Human Rights: a history*, W.W. Norton & Company, New York – London.

6. As general as possible. For the idea of the object of justice in Thomas, see: Thomas Aquinas, *Summa Theologiae* II-IIae, q. 57, a. 1.

7. The best reconstruction of the building of the Islamic legal thought, see: Wallaq W.B. (2012), *The origin and evolution of Islamic law*, Cambridge University Press, Cambridge, doi: https://doi.org/10.1017/CBO9780511818783.

8. African Union, Protocol to the African Charter of human and peoples' rights on the rights of women in Africa, available at: https://au.int/en/treaties/1170.

9. The list of the Coutries that have signed/ratified the Protocol are available at: 37077-sl-PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA.pdf (au.int).

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